equity to avoid muitiplicity. Early California decisions adhere to the rigid common law rules of joinder.[18]

Equity will not take jurisdiction to prevent a multiplicity of suits when the parties complaining have no prior existing cause of action or defense, legal or equitable.[19] On the other hand, if the numerous suits are baseless,[20] or are the result of conspiracy or bad faith, a bill will lie to enjoin them.[21]

The principal case misinterprets the Pomeroy doctrine in one respect. It considers Pomeroy's phrase "a community of interest in the questions of law and fact" to refer to cases wherein a single fact is decisive of the claim of all the parties. But the court itself quotes his statement that the jurisdiction exists "where the individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction." The true criterion is rather that set forth by Mr. Justice Peckham: "Each case . . . . must, as we think, be decided upon its own merits, and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any."[22]

A. R. R.

EVIDENCE: CORROBORATION OF TESTIMONY OF AN ACCOMPLICE.—In People v. Tobin [1] the Supreme Court again calls attention to the ambiguity of section 1111 of the Penal Code requiring the testimony of an accomplice to be corroborated by "such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." The decision is based on two early California cases decided under entirely different statutes and therefore hardly

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[18] Barham v. Hostetter (1885) 67 Cal. 272; Foreman v. Boyle (1891) 88 Cal. 290, 26 Pac. 94; Guerkink v. Petaluma (1896) 112 Cal. 306, 44 Pac. 570. But see Hillman v. Newington (1880) 57 Cal. 56.

[19] Ins. Co. v. Hoover Co. (1909) 173 Fed. 888.

[20] I. C. Ry. Co. v. Baker (1913) 155 Ky. 512, 159 S. W. 1169; Jordan v. Telegraph Co. (1904) 69 Kan. 140, 76 Pac. 396.

[21] S. P. Co. v. Robinson (1901) 132 Cal. 408, 64 Pac. 572.

[22] Hale v. Allinson (1902) 188 U. S. 56, 47 L. Ed. 380, 23 Sup. Ct. Rep. 244.

[1] (Dec. 6, 1918) 27 Cal. Dec. 768.

in point.[2] The rule of the common law that the testimony of an accomplice, though to be looked upon with distrust, would warrant a conviction if believed by the jury,[3] has been changed by statute in nearly half of the states.[4] The necessity for such statutes is probably due to the divided jurisdiction of the court and jury in this country.[5] Thus, the California Constitution provides that judges shall not charge juries with respect to matters of fact,[6] and under this provision an instruction that the testimony of an accomplice ought to be viewed with distrust was held erroneous though authorized by an express provision in the Code.[8] It has been suggested that these statutes place upon appellate courts a duty which might more properly rest with the jury, namely, that of determining the weight of the evidence.[9] There is, however, a distinction to be drawn between the mere preponderance of the evidence and the kind of evidence sufficient to sustain a charge, the determination of the latter being one of the functions of appellate courts.[10] If the purpose of the statute is merely to require a large quantum of evidence, it would appear that any corroboration whatsoever would be sufficient. But it has been held that corroboration which merely proves the credibility of the accomplice is not sufficient.[11] The corroboration must be independent of the testimony of the accomplice and not rest on his credit. The testimony of another accomplice is not sufficient,[12] but that of the accomplice's wife is.[13] Evidence which merely corroborates the witness generally or raises a sus-

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[2] People v. Josselyn (1870) 39 Cal. 393, based on Cal. Stats. 1861, p. 588, forbidding convictions in abortion cases "by the testimony of such woman alone"; and People v. Richardson (1911) 161 Cal. 552, 120 Pac. 20, based on § 1108 Cal. Pen. Code, requiring the woman in an abortion or seduction case to be corroborated "by other evidence."

[3] Reg. v. Stubbs (1855) 7 Cox, C. C. 48; Queen v. Boyes (1861) 9 Cox C. C. 32, 1 B. & S. 311, 121 Eng. Rep. R. 730.

[4] Wigmore, Evidence, § 2056, note 10.

[5] See also People v. Clough (1887) 73 Cal. 348, 15 Pac. 5, for a different theory based on anomalous conditions of English cases.

[6] Cal. Const., Art. VI, § 19.

[7] People v. Wardrip (1903) 141 Cal. 229, 74 Pac. 744.

[8] Cal. Code Civ. Proc., § 2061, subd. 4.

[9] Wigmore, Evidence, § 2062.

[10] Joy, Evidence of Accomplices, p. 10. "The defect in the evidence is not in its quantity but in its quality." Baron Joy, however, upholds the theory that any additional evidence is sufficient to supply the needed corroboration.

[11] People v. Clough (1887) 73 Cal. 348, 15 Pac. 5; People v. Baker (1896) 114 Cal. 617, 46 Pac. 601.

[12] People v. Creegan and Becker (1898) 121 Cal. 554, 53 Pac. 1082; Powers v. Commonwealth (1901) 110 Ky. 386, 23 Ky. L. 146, 63 S. W. 976, 53 L. R. A. 245.

[13] King v. Willis (1916) 1 K. B. 933, overruling the earlier case of Rex v. Neal and Taylor (1835) 7 C. & P. 168, 32 Eng. C. L. Rep. 555; Woods v. State (1884) 76 Ala. 35.

picion of guilt is not sufficient.[14] On the other hand, a feigned accomplice, or informer, does not come within the rule and his testimony requires no corroboration.[15]

To corroborate means to strengthen or make certain; but it is submitted that the rule in California requires not merely that the testimony of the accomplice be supported, but that it requires support by testimony of a different quality. The accomplice must be corroborated, not only in a material part of his story, but in that portion of his testimony which goes to establish the guilt of the accused; i. e., the corroborating evidence must tend to connect the defendant with the commission of the offense.[16] Under the original code section requiring evidence "which in itself, and without the aid of the testimony of the accomplice," tends to connect the defendant with the crime,[17] it was held error to instruct a jury that corroborative evidence was sufficient if it tended "in any way" to connect the defendant with the commission of the crime.[18] And the amendment to section 1111 of the Penal Code in 1911 omitting the above quoted words has been held not to change the old law.[19]

The test of the sufficiency of corroboration is this: Eliminate the evidence of the accomplice, and then if the evidence of other witnesses connects the defendant with the crime, the accomplice is corroborated.[20] Of course, corroborative evidence need not be sufficient to establish guilt, for in that event the testimony of the accomplice would not be needed.[21] Of itself, the corroborative evidence may be slight and entitled to but little consideration; nevertheless the requirements of the statute are fulfilled if there be corroborating evidence which of itself, tends to connect the defendant with the commission of the offense.[22] The statute does not require that the accomplice be corroborated in respect to every material fact, but only in respect to some of the material

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[14] People v. Ames (1870) 39 Cal. 403 (evidence "must tend, in some slight degree at least, to implicate the defendant"); People v. Melvane (1870) 39 Cal. 614; People v. McLean (1890) 84 Cal. 480, 24 Pac. 32; People v. Koenig (1893) 99 Cal. 574, 34 Pac. 238; People v. Sciaroni (1907) 4 Cal. App. 698, 89 Pac. 133.

[15] People v. Bolanger (1886) 71 Cal. 17, 11 Pac. 799; People v. Farrell (1866) 30 Cal. 316.

[16] People v. Bunkers (1905) 2 Cal. App. 197, 84 Pac. 364, 370; People v. Balkwell (1904) 143 Cal. 259, 76 Pac. 1017; People v. Josselyn (1870) 39 Cal. 393; cases cited, supra, n. 14.

[17] Cal. Pen. Code, § 1111, as enacted 1872.

[18] People v. Compton (1899) 123 Cal. 403, 56 Pac. 44.

[19] People v. Robbins (1915) 171 Cal. 466, 154 Pac. 317. Also important dissenting opinion, p. 479.

[20] Weldon v. State (1881) 10 Tex. App. 400. Approved in People v. Morton (1903) 139 Cal. 719, 73 Pac. 609.

[21] People v. Ames (1870) 39 Cal. 403.

[22] In re Buckley (1886) 69 Cal. 1, 10 Pac. 69; People v. Larsen (1893) 4 Cal. Unrep. 286, 34 Pac. 514; People v. Josselyn, supra, n. 16; People v. Sciaroni, supra, n. 14.

facts which constitute a necessary element in the crime alleged.[23] In other words, the evidence must show that particular defendant to be the criminal or show his individual connection with the case.[24] This may be supplied by admissions or conduct on his part tending to excite suspicion,[25] or by his own confession.[26] Proof that the accused was seen near the place of the crime is not sufficient, unless coupled with the subsequent flight of the defendant,[27] or proof that the accused was near the place in company with the accomplice.[28] The sufficiency of the corroboration must be governed largely by the circumstances of each particular case. It may consist of circumstantial as well as direct evidence.[29]

The decisions show that section 1111 of the Penal Code cannot be relied upon as a well-defined rule competent to solve all questions of corroboration. The question of corroborative evidence is purely one of the weight of certain facts. The facts in every case will differ and no two will be found exactly alike. No statutory rule can be devised that will fit every varying circumstance. It would seem, therefore, that an unnecessary burden has been placed upon appellate courts, namely, of determining a question which might far better rest with the jury. Of what value as an authority is a decision which finds that "the figment of evidence in support of the testimony of the accomplice does not rise to the dignity of corroboration?"[30] The statute itself often works a miscarriage of justice.[31]

Fundamentally the question is based on a conflict between the desire to bring to justice the man against whom there exists a grave suspicion of guilt and the principle that substantial independent evidence should be furnished to remove the taint of a participant's testimony. Can this difficulty be solved under a rigid statute in an apellate court? It is submitted that the rule of the common law leaving all the evidence to the jury is preferable. At common law it was the duty of the court to caution the jury that the testimony of an accomplice was to be looked

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[23] People v. Josselyn, supra, n. 16.

[24] People v. Garnett (1866) 29 Cal. 622; People v. McLean, supra, n. 14; People v. Hong Tong (1890) 85 Cal. 171, 24 Pac. 726; People v. Morton (1903) 139 Cal. 719, 73 Pac. 609.

[25] People v. Cleveland (1875) 49 Cal. 577; People v. Collins (1883) 64 Cal. 293, 30 Pac. 847; People v. Sternberg (1896) 111 Cal. 3, 43 Pac. 198.

[26] People v. Richardson (1911) 161 Cal. 552, 120 Pac. 20; People v. Josselyn, supra, n. 16; Patterson v. Commonwealth (1887) 86 Ky. 313, 9 Ky. L. 481, 5 S. W. 387, 765; Shaefer v. State (1893) 93 Ga. 177, 18 S. E. 552.

[27] Smith v. Commonwealth (1891) 17 S. W. 182 (Ky.); People v. Koenig, supra, n. 14.

[28] People v. Barker (1896) 114 Cal. 617, 46 Pac. 601.

[29] People v. Blunkall (1916) 31 Cal. App. 778, 161 Pac. 997.

[30] People v. Koenig, supra, n. 14.

[31] People v. Smith (1893) 98 Cal. 218, 33 Pac. 58.

upon with distrust, but they were not forbidden to return a verdict of guilty if they believed the accomplice spoke the truth.[32] The rule forbidding a judge to comment on the testimony is but one side of the tendency of recent times to cut away the power of the court.[33] Nothing has been suggested to take its place but the right of unlimited appeal. The real remedy is to restore the personal control of judges over jury trial. Their power to set aside verdicts, if properly exercised, would prove an ample safeguard. And finally the strict rules of the statute should give way before the instructions of the court in individual cases.[34]

G. H.

INJUNCTION: POWER TO ENJOIN PEACEFUL PICKETING.—The question presented in the case of *Rosenberg v. The Retailer's Association*[1] is the subject of peaceful picketing. In the lower court judgment as given restrained the defendant from interfering, harassing, or obstructing the plaintiff in the conduct of his business by means of threats, menace, or intimidation. It is the claim of the plaintiff that this judgment means nothing and asks that the defendant be enjoined from peaceful picketing. The court announced in its judgment that "picketing is inherently illegal for the reason that it is inseparably associated with acts that are indisputably illegal. Accordingly, it has been held that there can be no such a thing as peaceful picketing any more than there can be peaceful mobbing."

By California decisions it has been established that united labor has the right to enforce a boycott by means of peaceful oral persuasion. Menace, intimidation, and coercion cannot be resorted to.[2] The question whether picketing is a peaceful and lawful means is one that has also received frequent judicial consideration. In the case of Pierce v. Stablemen's Union,[3] decided by the Supreme Court in 1909, the decision was very definitely based upon the conception that the violence and coercion were

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[32] Supra, n. 3.

[33] Cal. Const., Art. VI, §4½, providing for review of case "including the evidence." Note the recent bill introduced in the House of Representatives forbidding Federal judges to comment on the evidence in jury trials (Feb. 5, 1918).

[34] Wigmore, Evidence, § 2057: "It may be noted, also, that the legislative creation of a rule of law, by introducing detailed refinements of definition to be applied by jurors has merely tended to confuse them with sounds of words and to place in the hands of counsel a set of juggling formulas with which to practice upon the chance of obtaining a new trial."

[1] (1918) 27 Cal. App. Dec. 769.

[2] Goldberg Bowen v. Stablemen's Union (1906) 149 Cal. 429, 86 Pac. 806, 117 Am. St. Rep. 145; Pierce v. Stablemen's Union (1909) 156 Cal. 70, 103 Pac. 324; Crescent Feather Co. v. United Upholsterers' Union (1908) 153 Cal. 433, 95 Pac. 871.

[3] Supra, n. 2.